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8 UNITED STATES DISTRICT COURT
9 CENTRAL DISTRICT OF CALIFORNIA-WESTERN DIVISION
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11 JOSE ROSAS,) Case No. CV 17-00665-JAK(AS)
12)
12) Petitioner,) FINAL REPORT AND RECOMMENDATION
13)
13) v.) OF A UNITED STATES MAGISTRATE
14)
14) DEAN BORDERS,) JUDGE
15)
15) Respondent.)
16)
16 _____)

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18 This Final Report and Recommendation is submitted to the
19 Honorable John A. Kronstadt, United States District Judge, pursuant
20 to 28 U.S.C. § 636 and General Order 05-07 of the United States
21 District Court for the Central District of California.

22 I. PROCEEDINGS
23

24 On November 28, 2016, Jose Rosas ("Petitioner") constructively
25 filed a Petition for Writ of Habeas Corpus by a Person in State
26 Custody ("Petition") in the Ninth Circuit Court of Appeals. (Docket
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1 Entry No. 1).¹ The Petition was transferred to the United States
2 District Court for the Central District of California on January
3 27, 2017. (Docket Entry No. 2).

4
5 On February 1, 2017, the Court, finding that the Petition was
6 deficient in two separate respects, issued an Order Requiring the
7 Filing of a First Amended Petition. (Docket Entry No. 4).
8 Petitioner did not respond to the Court's Order. On March 17,
9 2017, the Court issued an Order to Show Cause why this action
10 should not be dismissed for Petitioner's failure to comply with
11 Court orders and/or for his failure to prosecute pursuant to
12 Fed.R.Civ.P. 41(b). (Docket Entry No. 5).

13
14 On April 12, 2017, Petitioner filed a First Amended Petition
15 for Writ of Habeas Corpus by a Person in State Custody pursuant to
16 28 U.S.C. § 2254 ("First Amended Petition") (Docket Entry No. 6),
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18 ¹ The Petition was signed on November 28, 2016. Attached
19 to the Petition is a Proof of Service by Mail dated November 28,
20 2016, indicating that the Petition was mailed to the "U.S. Court of
21 Appeals Building, 95 Seventh Street, San Francisco, CA 94103, P.O.
22 Box 193939 San Francisco, CA 94419." According to Petitioner, the
23 Petition was "sent out from the California Court of Appeal to the
24 Ninth Circuit Court of Appeals." (Docket Entry No. 18 at 3-4). A
25 habeas petition is constructively filed on the date a prisoner
26 presents his federal habeas petition to prison authorities for
27 forwarding to the Clerk of the Court. Saffold v. Newland, 250
28 F.3d 1262, 1268 (9th Cir. 2000), vacated on other grounds, 536 U.S.
214 (2002); Huizar v. Carey, 273 F.3d 1220, 1222 (9th Cir. 2001).
For the purposes of its analysis, the Court will use November 28,
2016, the date the Petition was signed, as the filing date.

1 which resulted in the vacating of the Order to Show Cause (see
2 Docket Entry No. 2 n. 1).

3
4 The First Amended Petition asserts the following grounds for
5 federal habeas relief: (1) Petitioner received ineffective
6 assistance of trial counsel for failing to investigate all of the
7 elements of the allegation against Petitioner and for failing to
8 search for exculpatory evidence such as forensic medical reports;
9 Petitioner also received ineffective assistance of appellate
10 counsel; (2) There was outrageous government misconduct since
11 independent evidence was not introduced to support a valid claim of
12 child molestation, oral copulation and sex with a child under 10;
13 (3) Petitioner was interrogated by a police officer without counsel
14 being present; (4) Petitioner was interrogated without the charges
15 against him being disclosed; and (5) There was a violation under
16 Brady v. Maryland, 373 U.S. 83 (1963) based on the failure of
17 Petitioner's counsel to find "factors of innocence" and to protect
18 Petitioner "against presentation of false evidence[.]" (See
19 Petition at 43, 45).²

20
21 On June 14, 2017, Respondent filed a Motion to Dismiss the
22 First Amended Petition ("Motion to Dismiss")(Docket Entry No. 12),
23 contending that (1) the Petition is time barred, (2) its claims are
24 impermissibly conclusory, and (3) Ground Two, to the extent that it

26 ² The Court is using the page numbering of the ECF-Filing
27 system.

1 alleges an ineffective assistance of appellate counsel claim, is
2 unexhausted. (See Motion to Dismiss at 3-12).³

3
4 On August 16, 2017, Petitioner filed a "Motion in Opposition
5 to Dismiss Petition" ("Opposition"). (Docket Entry No. 18).

6
7 On August 17, 2017, the Court issued a Report and
8 Recommendation recommending that Respondent's Motion to Dismiss the
9 First Amended Petition be granted because the Petition was
10 untimely. (Docket Entry No. 20).

11
12 On September 8, 2017, Petitioner filed Objections to the
13 Report and Recommendation ("Objections"). (Docket Entry No. 21).

14
15 The Court now issues this Final Report and Recommendation to
16 address Petitioner's Objections.

17 18 **II. BACKGROUND**

19
20 In 2012, a Los Angeles County Superior Court jury found
21 Petitioner guilty of five counts of a lewd or lascivious act upon
22 a child under the age of 14 years in violation of Cal. Penal Code
23 ["P.C."] § 288(b) (Counts 1, 3, 5, 7 and 8), one count of sexual
24 intercourse by a person over 18 years of age with a child who is 10

25
26 ³ The Court's determination that the First Amended Petition
27 is time barred renders it unnecessary for the Court to address
28 Petitioner's alternative contentions.

1 years of age or younger in violation of P.C. § 288.7(a) (Count 2),
2 one count of a forcible lewd or lascivious act upon a child under
3 the age of 14 years in violation of P.C. § 288(b)(1) (Count 4), and
4 one count of continuous sexual abuse of a child under the age of 14
5 years in violation of P.C. § 288.5(a) (Count 6). On June 18, 2012,
6 the trial court sentenced Petitioner to a total of 55 years to
7 life, which consisted of 16 years on Count 1, a consecutive term of
8 8 years on Count 4, consecutive terms of 2 years each on Counts 1,
9 7 and 8, and a consecutive term of 25 years to life on Count 2.
10 (See Respondent's Notice of Lodging ["Lodgment"] No. 1 at 2; First
11 Amended Petition at 2).

12
13 Petitioner appealed his convictions and sentence to the
14 California Court of Appeal,⁴ which, on January 27, 2014, affirmed
15 the Judgment. (See Lodgment No. 2). Petitioner then filed a
16 Petition for Review with the California Supreme Court, which was
17 summarily denied on April 30, 2014. (See Respondent's Notice of
18 Supplemental Lodging ["Supplemental Lodgment"] No. 11; Lodgment No.
19 5).⁵

21 ⁴ Neither party has provided the Court with a copy of
22 Petitioner's appellate brief(s).

23 ⁵ Although Petitioner's appellate counsel declined to file
24 a Petition for Review (see Objections at 4-5, Exhibit "B"),
25 Petitioner filed a Petition for Review with permission. (See
26 Supplemental Lodgment No. 11;
27 <http://appellatecases.courtinfo.ca.gov>).

28 Neither party has provided the Court with a copy of the
California Supreme Court's Order denying the Petition for Review.

III. DISCUSSION

A. The Limitations Period

The Antiterrorism and Effective Death Penalty Act ("AEDPA") applies to the First Amended Petition because it was filed after the statute's effective date of April 24, 1996. See Lindh v. Murphy, 521 U.S. 320, 322-23 (1997). Under AEDPA, state prisoners must file their federal habeas petitions within one-year of the latest of the following dates:

(A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;

(B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;

(C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

1 (D) the date on which the factual predicate of the
2 claim or claims presented could have been
3 discovered through the exercise of due diligence.
4

5 28 U.S.C. § 2244(d)(1). "AEDPA's one-year statute of limitations
6 in § 2244(d)(1) applies to each claim in a habeas application on an
7 individual basis." Mardesich v. Cate, 668 F.3d 1164, 1171 (9th
8 Cir. 2012). The limitations period is tolled when a prisoner
9 properly files an application for state post-conviction review
10 (statutory tolling) and may also be tolled during reasonable
11 periods of time between such state habeas proceedings (gap
12 tolling). 28 U.S.C. § 2244(d)(2); Pace v. DiGuglielmo, 544 U.S.
13 408, 410 (2005).
14

15 AEDPA's limitations period may also be tolled for equitable
16 reasons "in appropriate cases." Holland v. Florida, 560 U.S. 631,
17 645 (2010). The Ninth Circuit recognizes the availability of
18 equitable tolling of the one-year statute of limitations in
19 situations where "extraordinary circumstances beyond a prisoner's
20 control make it impossible to file a petition on time." Spitsyn v.
21 Moore, 345 F.3d 796, 799 (9th Cir. 2003). A prisoner must
22 establish that: (1) he has been pursuing his rights diligently; and
23 (2) some extraordinary circumstance caused the delay. Holland, 560
24 U.S. at 649. This is a highly fact-dependent determination.
25 Spitsyn, supra.
26
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1 B. Petitioner Did Not File His Petition Within The Limitations
2 Period

3 As indicated above, a petitioner ordinarily has one-year from
4 the date that the state court's judgment becomes final to file a
5 federal habeas petition. See 28 U.S.C. § 2244(d)(1). A case
6 becomes final at "the conclusion of direct review or the expiration
7 of the time for seeking such review." 28 U.S.C. § 2244(d)(1)(A).
8

9 The California Supreme Court denied Petitioner's Petition for
10 Review on April 30, 2014. Petitioner's conviction became final on
11 July 29, 2014, when Petitioner's time to petition the United States
12 Supreme Court for a writ of certiorari expired.⁹ See Wixom v.
13 Washington, 264 F.3d 894, 897 (9th Cir. 2001); Bowen v. Roe, 188
14 F.3d 1157, 1158-59 (9th Cir. 1999). Therefore, the AEDPA one-year
15 statute of limitations commenced on July 30, 2014 and, absent the
16 application of an alternate start date under § 2244(d)(1),¹⁰ or
17 sufficient statutory or equitable tolling, the limitations period
18 expired one year later, on July 30, 2015. See Patterson v.
19 Stewart, 251 F.3d 1243, 1246 (9th Cir. 2001).
20

21 As set forth above, Petitioner did not file the instant First
22

23 ⁹ Pursuant to United States Supreme Court Rule 13.1,
24 petitioner had 90 days from the date the California Supreme Court
denied his Petition for Review to petition the Supreme Court for a
writ of certiorari.

25 ¹⁰ Since Petitioner does not allege the applicability of any
26 circumstances that would delay the running of the statute of
27 limitations (see 28 U.S.C. § 2244(d)(1)(B)-(D)), the Court will not
address those provisions.

1 Amended Petition until November 28, 2016, almost 16 months after
2 the statute of limitations expired on July 30, 2015.

3
4 C. Petitioner is Not Entitled to Statutory Tolling

5
6 Petitioner is not entitled to statutory tolling during the
7 pendency of the habeas petitions he filed in the Los Angeles County
8 Superior Court and the California Supreme Court. This is because
9 a petition filed *after* the conclusion of the limitations period
10 cannot reinitiate the limitations period. See Ferguson v.
11 Palmateer, 321 F.3d 820, 823 (9th Cir. 2003)("[S]ection 2244(d)
12 does not permit the reinitiation of the limitations period that has
13 ended before the state petition was filed"); Jiminez v. Rice, 276
14 F.3d 478, 482 (9th Cir. 2001)(filing of state habeas petition "well
15 after the AEDPA statute of limitations ended" resulted in an
16 "absolute time bar to [filing] a federal petition); Webster v.
17 Moore, 199 F.3d 1256, 1259 (11th Cir. 2000)("[A] state-court
18 petition . . . that is filed following the expiration of the
19 limitations period cannot toll that period because there is no
20 period remaining to be tolled.").

21
22 Therefore, absent grounds for equitable tolling, the First
23 Amended Petition is untimely.

1 D. Petitioner Is Not Entitled To Equitable Tolling

2
3 The United States Supreme Court has recognized the
4 availability of equitable tolling to the one-year statute of
5 limitations in "extraordinary circumstances," such as those
6 involving "serious instances of attorney misconduct." Holland, 560
7 U.S. at 649-52.

8
9 The Ninth Circuit recognizes the availability of equitable
10 tolling of the one-year statute of limitations in situations where
11 extraordinary circumstances beyond a prisoner's control make it
12 impossible to file a petition on time. Spitsyn, 345 F.3d at 799.
13 The words "extraordinary" and "impossible" suggest the limited
14 availability of this doctrine, and to date the Ninth Circuit has
15 found very few circumstances which warrant equitable tolling.¹¹ See

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17 ¹¹ See e.g., Grant v. Swarthout, 862 F.3d 914, 925-26 (9th
18 Cir. 2017)(equitable tolling warranted where prison officials
19 failed to provide petitioner with a requested prison account
20 certificate, a document the petitioner needed in order to file his
21 habeas petition); Luna v. Kernan, 784 F.3d 640, 646-49 (9th Cir.
22 2015)(equitable tolling warranted where petitioner's counsel
23 voluntarily dismissed petitioner's timely federal habeas petition
24 for no good reason, misled petitioner to believe that a fully
25 exhausted federal habeas petition would be filed "shortly" [without
26 informing petitioner that the statute of limitations was going to
27 run in three weeks]), and misled petitioner to believe for more
28 than six years that his federal habeas petition was moving forward
toward a hearing on the merits); Rudin v. Myles, 781 F.3d 1043,
1056-59 (9th Cir. 2015)(equitable tolling warranted where
petitioner's first counsel abandoned petitioner by making minimal
visits to petitioner and then stopping the visits, blocking
petitioner's phone calls, not showing an intention at post-
conviction hearings to actually represent petitioner, and failing
to provide petitioner with reasons for counsel's delay; and where

1 Waldron-Ramsey v. Pacholke, 556 F.3d 1008, 1011 (9th Cir. 2009) ("To
2 apply the doctrine in 'extraordinary circumstances' necessarily
3 suggests the doctrine's rarity."). A petitioner must establish
4 that: (1) he has been pursuing his rights diligently; and (2) some
5 extraordinary circumstance caused the delay. Pace, 544 U.S. at
6 418. This is a highly fact-dependent determination. Spitsyn,
7 supra. Petitioner bears the burden to prove equitable tolling.
8 See Zepeda v. Walker, 581 F.3d 1018, 1019 (9th Cir. 2009).
9 Petitioner must show that "'the extraordinary circumstances were
10 the cause of his untimeliness . . . and that the 'extraordinary
11 circumstances ma[de] it impossible to file a petition on time.'" Ramirez v. Yates, 571 F.3d 993, 997 (9th Cir. 2009)(citations
12 omitted). Petitioner must show that an "external force" caused the
13 untimeliness, rather than "oversight, miscalculation or
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16 the state affirmatively misled petitioner into believing that the
17 state court had excused petitioner's late filing and that the
18 statute of limitations would be statutorily tolled); Gibbs v.
19 LeGrand, 767 F.3d 879, 886-88 (9th Cir. 2014)(equitable tolling
20 warranted where petitioner's counsel abandoned petitioner by
21 failing to notify him of the state supreme court's denial of his
22 appeal of his state post-conviction petition until after the
23 expiration of the statute of limitations, despite petitioner's
24 repeated inquiries); Doe v. Busby, 661 F.3d 1001, 1012-15 (9th Cir.
25 2011)(equitable tolling warranted where petitioner's counsel failed
26 to file federal habeas petition after making numerous promises to
27 timely file, did not return petitioner's file until long after the
statute of limitations had run, and petitioner was reasonably
diligent in pursuing his rights); and Bills v. Clark, 628 F.3d
1092, 1098-1101 (9th Cir. 2010)(equitable tolling may be warranted
where mental impairment so severe that petitioner was unable
personally either to understand the need to timely file or prepare
a habeas petition, and that impairment made it impossible under the
totality of the circumstances to meet the filing deadline despite
petitioner's diligence).

1 negligence." Waldron-Ramsey, 556 F.3d at 1011 (citation omitted);
2 see also Holland, 560 U.S. at 651-52.

3
4 Although Petitioner alleges that he is entitled to equitable
5 tolling (see Opposition, Exhibit "A" at 2, Exhibit "B" at 7),
6 Petitioner has not proffered any facts to warrant a finding of
7 equitable tolling in this case.

8
9 Moreover, to the extent that petitioner is claiming actual
10 innocence in an attempt to bypass the statute of limitations hurdle
11 -- (see Opposition, Exhibit "A" at 1-6, Exhibit "B" at 7-15;
12 Objections at 1-6); see also McQuiggin v. Perkins, 133 S.Ct. 1924,
13 1928 (2013)("We hold that actual innocence, if proved, serves as a
14 gateway through which a petitioner may pass whether the impediment
15 is a procedural bar, as it was in *Schlup* and *House*, or, as in this
16 case, expiration of the statute of limitations.") -- Petitioner has
17 failed to show that the actual innocence exception to the statute
18 of limitations applies in his case. Under the actual innocence
19 exception to the statute of limitations, a petitioner must show
20 that "'in light of the new evidence, no juror, acting reasonably,
21 would have voted to find him guilty beyond a reasonable doubt.'" McQuiggin v. Perkins, supra (quoting Schlup v. Delo, 513 U.S. 298,
22 329 (1995)); see House v. Bell, 547 U.S. 518, 538 (2006)("A
23 petitioner's burden at the gateway stage is to demonstrate that
24 more likely than not, in light of the new evidence, no reasonable
25 juror would find him guilty beyond a reasonable doubt-or, to remove
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1 the double negative, that more likely than not any reasonable juror
2 would have reasonable doubt.").

3
4 Here, Petitioner did not allege why he is actually innocent,
5 either in the First Amended Petition or in the Opposition.
6 Petitioner's claim of actual innocence, as asserted in his
7 Objections (see Objections at 1-6), are merely claims of a coerced
8 confession, the failure to disclose exculpatory evidence, the
9 denial of the right to confront a witness, and ineffective
10 assistance of appellate counsel. See Bousley v. United States, 523
11 U.S. 614, 623 (1998) (" 'Actual innocence' means factual innocence,
12 not mere legal insufficiency."); Morales v. Ornoski, 439 F.3d 529,
13 533-34 (9th Cir. 2006). Moreover, Petitioner has not even
14 purported to make a showing of actual innocence, supported by new
15 reliable evidence. See Schlup v. Delo, 513 U.S. at 324 ("To be
16 credible, [a claim of actual innocence] requires petitioner to
17 support his allegations of constitutional error with new reliable
18 evidence--whether it be exculpatory scientific evidence,
19 trustworthy eyewitness accounts, or critical physical evidence--
20 that was not presented at trial."). Petitioner simply has not
21 presented an "exceptional case[] involving a compelling claim of
22 actual innocence." House v. Bell, 547 U.S. at 521; see Schlup v.
23 Delo, supra ("[E]xperience has taught us that a substantial claim
24 that constitutional error has caused the conviction of an innocent
25 person is extremely rare."); McQuiggin v. Perkins, supra ("We
26 caution, however, that tenable actual-innocence gateway pleas are
27 rare").

1
2 Because Petitioner is not entitled to statutory tolling and
3 has failed to demonstrate any entitlement to equitable tolling, the
4 Court must find that the Petition is untimely.

5
6 **IV. RECOMMENDATION**

7
8 For the foregoing reasons, IT IS RECOMMENDED that the Court
9 issue an Order: (1) approving and accepting this Final Report and
10 Recommendation; (2) granting the Motion to Dismiss the First
11 Amended Petition; (3) denying the First Amended Petition for Writ
12 of Habeas Corpus; and (4) and dismissing this action with
13 prejudice.

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15 DATED: September 18, 2017

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17 _____ /s/
18 ALKA SAGAR
19 UNITED STATES MAGISTRATE JUDGE
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